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**PROGRESS REPORT OF THE COMMISSION ON THE
IMPLEMENTATION OF THE DECISIONS OF THE ASSEMBLY OF THE
AFRICAN UNION ON THE INTERNATIONAL CRIMINAL COURT**

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I. INTRODUCTION

1. The Extraordinary Ordinary Session of the Assembly of the African Union held in Addis Ababa, Ethiopia on 12 October 2013 considered Africa's relationship with the International Criminal Court (ICC). Subsequently, the Assembly adopted Decision Ext/Assembly/AU/Dec.1 (Oct.2013), *inter alia*, as follows:

10. "NOW DECIDES:

- (i) *That to safeguard the constitutional order, stability and, integrity of Member States, no charges shall be commenced or continued before any International Court or Tribunal against any serving AU Head of State or Government or anybody acting or entitled to act in such capacity during their term of office;*
- (ii) *That the trials of President Uhuru Kenyatta and Deputy President William Samoei Ruto, who are the current serving leaders of the Republic of Kenya, should be suspended until they complete their terms of office;*
- (iii) *To set up a Contact Group of the Executive Council to be led by the Chairperson of the Council, composed of five (5) Members (one (1) per region) to undertake consultations with the Members of the United Nations Security Council (UNSC), in particular, its five (5) Permanent Members with a view to engaging with the UNSC on all concerns of the AU on its relationship with the ICC, including the deferral of the Kenyan and the Sudan cases in order to obtain their feedback before the beginning of the trial on 12 November, 2013;*
- (iv) *To fast track the process of expanding the mandate of the African Court on Human and Peoples' Rights (AfCHPR) to try international crimes, such as genocide, crimes against humanity and war crimes;*
- (v) *That the Commission expedites the process of expansion of AfCHPR to deal with international crimes in accordance with the relevant decision of the Policy Organs and **INVITES** Member States to support this process;*
- (vi) *That African States Parties propose relevant amendments to the Rome Statute, in accordance with Article 121 of the Statute;*
- (vii) *To request African States Parties to the Rome Statute of the ICC, in particular the Members of the Bureau of the Assembly of States Parties to inscribe on the agenda of the forthcoming sessions of the ASP the issue*

of indictment of African sitting Heads of State and Government by the ICC and its consequences on peace, stability and reconciliation in African Union Member States;

- (viii) That any AU Member State that wishes to refer a case to the ICC may inform and seek the advice of the African Union;*
- (ix) That Kenya should send a letter to the United Nations Security Council requesting for deferral, in conformity with Article 16 of the Rome Statute, of the proceedings against the President and Deputy President of Kenya that would be endorsed by all African States Parties;*
- (x) Pursuant to this Decision, to request the ICC to postpone the trial of President Uhuru Kenyatta, scheduled for 12 November 2013 and suspend the proceedings against Deputy President William Samoei Ruto until such time as the UN Security Council considers the request by Kenya, supported by the AU, for deferral;*
- (xi) That President Uhuru Kenyatta will not appear before the ICC until such time as the concerns raised by the AU and its Member States have been adequately addressed by the UN Security Council and the ICC;*
- (xii) To convene, an Extraordinary Session, towards the end of November 2013, to review the progress made in the implementation of this Decision of the AU Assembly (Ext/Assembly/AU/Dec.1(Oct.2013)).*

11. FINALLY REQUESTS *the Commission to report on the implementation of this Decision to the next Ordinary Session of the Assembly in January 2014”.*

2. The present Report has been prepared pursuant to the above Assembly Decision with a view to updating the AU Policy Organs on the developments that occurred since the adoption of the said Decision.

II. OUTCOME OF THE INTERACTION BETWEEN AU CONTACT GROUP ON ICC AND THE MEMBERS OF THE UNITED NATIONS (UN) SECURITY COUNCIL

3. In implementation of the above mentioned Decision, a Contact Group of the Executive Council on ICC, representing each region of Africa, was set up under the Chairpersonship of H.E Dr. Tedros Adhanom Ghebreyesus, Minister of Foreign Affairs of Ethiopia and Chairperson of the Executive Council, and composed as follows:

- H.E Henry Okello Oryem, Minister of State for Foreign Affairs of Uganda (Eastern Region);

- H.E. Mr. Ahmed Teguedi, Minister of Foreign Affairs of Mauritania (Northern Region);
- Hon. Dr Albert Kawana, MP, Minister of Presidential Affairs and Attorney General of Namibia (Southern Region);
- H.E Mankeur Ndiaye, Minister of Foreign Affairs of Senegal (Western Region);
- Ms Anesie Ndayishimiye, Charge d’Affaires of the Permanent Mission of Burundi to UN (Central Region).

4. The Contact Group and H.E Ms Amina C. Mohamed, Cabinet Secretary, Foreign Affairs of Kenya undertook an official mission to New York, from 27 to 31 October 2013, to engage with the United Nations Security Council (UNSC) in conformity with its mandate. The Contact Group also held consultations with the UN Secretary General, the President of the UN General Assembly, the President of the Assembly of States Parties to the Rome Statute of the ICC (ASP) and the African Group in New York.

5. Following bilateral consultations with the Members of the UN Security Council, the Contact Group attended an interactive dialogue with the UNSC at the UN Headquarters on 31 October 2013. During this dialogue, the Members of the Contact Group pointed out the following:

- i) Africa did not condone impunity and was committed to the fight against impunity in conformity with the AU Constitutive Act which provides for the right of the Union to intervene in cases of international crimes such as genocide, war crimes and crimes against humanity;
- ii) Kenya had been a beacon of peace and stability in the Eastern Africa Region apart from the unfortunate post-election violence of 2007-2008; and it is important for the country to consolidate its stability;
- iii) Kenya had taken necessary actions towards peace and reconciliation including through the reform of its judiciary and police as well as other institutions of governance;
- iv) Reparations were paid to the victims and all Internally Displaced Persons had been resettled; and the President and Deputy President of Kenya had played a significant role in redressing the negative impacts of the post-election violence of 2007-2008;
- v) The decision of the people of Kenya to elect the President and Deputy President should be respected and the latter need to be able to discharge their constitutional responsibilities efficiently and effectively, in particular in light of the Westgate terrorist attack and the clear danger posed by *Al shabab/al Qaeda* in the region as recognized by UNSC in its statement after

the Westgate tragedy wherein it reaffirmed that terrorism in all its form and manifestations was a threat to international peace and security;

- vi) The non-cooperation of the ICC in the past in the Kenyan cases left a lot to be desired;
- vii) The concerns of Africa, if Kenya were to be destabilized, were genuine and it was important for the International Community to trust Africa and to prevent any further crisis in a region that is so volatile and where the difference between peace and no peace is not easy to define;
- viii) The AU's position cannot be perceived as having no justification and the Kenyan situation warrants UNSC to exercise its mandate under Article 16 of the Rome Statute of the ICC read together with Chapter VII of the UN Charter to allow Kenya to move forward and deal with the challenges confronting it;
- ix) The time had come for both the ICC and UNSC to stop ignoring the voice of Africa and to give a satisfactory response to the request for deferral of the proceedings against the President and Deputy President of Kenya in accordance with Article 16 of the Rome Statute of the ICC.

6. In reaction, each Member of UNSC expressed its view on the request for deferral of the proceedings against the President and Deputy President of Kenya in accordance with Article 16 of the Rome Statute of the ICC, as they had done during bilateral consultations. The Members of UNSC were divided on the matter as reflected in their respective statements in favor of or against the request for deferral.

7. The seven (7) Members of UNSC supporting the request for deferral namely, **Morocco, Rwanda, Togo, Azerbaijan, China, Russia and Pakistan** in their statements stated, *inter alia*, as follows:

- i) Continuing the judicial proceedings against the President and Deputy President of Kenya in the current insecurity situation is incompatible with the overall need to ensure peace and stability in Kenya and in the region;
- ii) It was important for Kenya to continue to play its rightful role with its democratically elected leaders discharging their constitutional duties effectively and efficiently;
- iii) The dialogue on issues arising from the Kenyan cases was overdue and discussions taking place on a matter of serious concern to the African continent were welcomed;
- iv) The request for deferral was not advancing impunity or weakening the international justice system since it was within the legal framework of the

Rome Statute and in accordance with Article 16 of the Rome Statute of the ICC; and was merely to allow the leaders of Kenya to address pressing matters of security in the country and in the region;

- v) The recent decision from the ICC on the postponement of the trial's commencement of the President of Kenya and the proposals of the Members of UNSC to look into other avenues were not relevant at this stage and particularly were proof of politicization and lack of independence of the ICC had been demonstrated through the lack of flexibility in the past requests from Kenya ;
- vi) As long as terrorism is considered a threat to peace and stability, UNSC should grant the deferral for twelve (12) months in accordance with Article 16 of the Rome Statute of the ICC to enable Kenya sort out all its issues with the Assembly of States Parties and ICC and to pursue its efforts in the fight against terrorism and other broader security issues including those related to Somalia;
- vii) The judicial proceedings against the leadership of Kenya could complicate the situation of a country that is facing threats to peace and security;
- viii) The adoption of a new Constitution strengthening the governance structure of Kenya and the peaceful and democratic elections thereafter had demonstrated Kenya's determination to move forward while addressing the causes of the 2007-2008 post-election violence;
- ix) Welcomed the fact that the President and Deputy President of Kenya had been fully cooperating with the ICC and continued to do so;
- x) The concept of complementarity is the cornerstone of the international criminal justice and Kenya was now able to address its own issues, thus the ICC should consider that fact;
- xi) It was important for UNSC to exercise its mandate under Article 16 of the Rome Statute of the ICC and defer the cases of the President and Deputy President of Kenya since the country had entered a new phase under a new constitutional dispensation, and continued to play a critical role in the fight against terrorism including the attack on Westgate in Nairobi and the attempts in Kampala, Uganda and Addis Ababa, Ethiopia which was proof that there was a threat to peace and stability not only in the country but in the region;
- xii) The President and Deputy President of Kenya should not be answering charges in The Hague as it would affect their capacity to discharge their constitutional duties; and the international legal norms should provide for immunity for elected leaders;

- xiii) All the eight (8) cases before the ICC related to Africa, thus the perception that ICC only targeted Africa; and nearly 70% of UNSC agenda related to Africa and therefore, it was important to treat AU as a partner in solving Africa's problems;
- xiv) Article 16 of the Rome Statute of the ICC was clear and UNSC had the power to defer a matter for twelve (12) months, and to renew it, as is the case of Kenya since the demands of peace and security can be invoked and therefore, UNSC should discuss this option and consider the honest appeal that had been made by AU;
- xv) The AU had serious concerns over the handling of the Kenyan cases by the ICC, thus the justification for a request for deferral of the proceedings against the President and Deputy President of Kenya in accordance with Article 16 of the Rome Statute of the ICC;
- xvi) It was important for UNSC to respect the position of the country as well as regional organizations concerned, and in this instance Kenya and the AU respectively;
- xvii) The need for international judicial organs to respect the sovereignty of countries and democratically elected national leaders, in particular since the jurisdiction of the ICC was limited by the principle of complimentary;
- xviii) UNSC should heed the call by African countries and treat the issue with seriousness and prudence but as early as possible;
- xix) It was important for the International Community to respect the democratically will of the Kenyan people in electing its President and Deputy President;
- xx) The fact that the AU deemed it necessary to send a high level delegation underlined the importance of the issue not only for Kenya but for AU as well and it was legitimate for the AU to expect concrete actions from UNSC that would allow Kenya to deal with the threat to its national security and to that of the region;

8. The eight (8) Members of the UNSC opposed to the deferral, namely **Argentina, Australia, France, Guatemala, Luxembourg, Republic of Korea, United Kingdom and USA**, in their respective statements, pointed out, inter alia, the following:

- i) Kenya is a state party to the ICC and respected the rule of law, thus the request for deferral within the legal framework of the ICC but it was important to reconcile the mandate of ICC and the mandate of UNSC;

- ii) Kenya plays a key role in the region and it is important for the President of Kenya to effectively lead the country and the recent decisions of the ICC through the Chamber of Appeals appeared to have considered all possible measures to allow for flexibility in the trials of the President and Deputy President of Kenya including the temporary postponement of the trial of the President;
- iii) Justice is necessary for national reconciliation; and the efforts made by Kenya to foster national reconciliation after the post-election violence of 2007-2008 are welcomed;
- iv) Kenya is a key player in the Horn of Africa, in particular in Somalia, and its situation requires the President and the Deputy President to be able to discharge their constitutional duties to avoid any negative impact on the country;
- v) Other possible options within the legal framework of the Rome Statute of the ICC, including proposals for amendments made by Liechtenstein, Botswana and Jordan to Rule 134 of the Rules of Procedure and Evidence which would allow trial by way of videoconferencing and would be discussed at the session of ASP scheduled end of November 2013;
- vi) The use of Article 16 of the Rome Statute of the ICC does not seem to be necessary as the situation in Kenya does not meet the criteria of Chapter VII, namely the threat to international peace and security;
- vii) The concerns of Kenya and AU about the proceedings initiated against the President and Deputy President of Kenya before the ICC were noted and it was important for AU and UNSC to continue dialogue in order to make progress on the serious issues raised by Kenya and AU about the threat to peace and stability in the Eastern Africa Region and the Great Lakes Region;
- viii) The need for flexibility by the ICC to allow the leaders of Kenya to attend to their constitutional duties; however it was equally important for justice to be done as it was a critical element for lasting peace;
- ix) Kenya should continue to work with the ongoing ICC trial processes and to address any issue through the legal framework of the Rome Statute of the ICC in particular, at the Assembly of State Parties (ASP);
- x) Kenya should continue implementation of its new Constitution and upholding human rights;
- xi) Article 16 of the Rome Statute of the ICC provides for the decisive role of UNSC in dealing with situations where requirements of peace and justice are at odds with each other but that was not apparent in the Kenyan cases;

- xii) The UNSC should not intervene at this stage to ensure that the independence of the ICC is not compromised and the ICC seems to be flexible given that there was indication that the prosecutor would not oppose the postponement of the trial of the President of Kenya until February 2014;
- xiii) Kenya's role in the region is of vital importance, in particular in the fight against global terrorism; the appalling attack on Westgate demonstrated the scale of the challenges that the world faced against terrorism;
- xiv) The concerns raised by Kenya and AU should not be addressed through Article 16 of the Rome Statute of the ICC, but through the ICC and at ASP;
- xv) There are different options to be explored. Firstly with the ICC and in this regard, the decision of the Appeals Chamber providing possibilities for the President and Deputy President of Kenya to be absent and the postponement of the trial of the President of Kenya was encouraging. Secondly, the cooperation with the ICC should be followed by discussions at the Assembly of State Parties including proposals for amendment to the Rules of Procedure and Evidence to give flexibility and enable things such as trial by videoconferencing;
- xvi) The decision of the ICC to delay the trial of the President of Kenya until February 2014 was a positive development and would provide an opportunity to consider all the details of the concerns by Kenya and AU before the Assembly of States Parties later in the month of the November 2013;
- xvii) UNSC could not reach an agreement as its Members have different perspectives about the relationship between the ICC and UNSC; however, this should only be the beginning of a more serious dialogue between AU and UNSC.

III. CONSIDERATION OF THE REQUEST FOR DEFERRAL BY THE UN SECURITY COUNCIL

9. As requested by the above-mentioned Assembly Decision, the request for deferral of the proceedings initiated by ICC against the President and Deputy President of Kenya was submitted by Kenya. In the same vein, a letter signed by forty- five (45) AU Members States supporting the request for deferral was handover by the Chairperson of the Contact Group to the President of UNSC of the month of October 2013 on behalf of the African Union.

10. Following interaction between the Contact Group and UNSC in New York and the formal submission to UNSC of the request for deferral by Kenya with the support of AU, the African Members of UNSC tabled the matter on the agenda of UNSC. A Draft

Resolution was developed by the African Members of UNSC under the coordination of Rwanda with the inputs of other Members of UNSC and the AU Commission and the support of the African Group in New York.

11. The Draft Resolution on ICC Deferral was considered by a formal session of the UNSC held on 15 November 2013 and subsequently submitted for voting the same day. In this regard, seven (7) members of UNSC namely Morocco, Togo, Rwanda, Azerbaijan, China, Pakistan and Russia voted in favor of the Resolution while the remaining eight (8) members of UNSC namely Argentina, Australia, France, Republic of Korea, Luxembourg, Guatemala, UK and USA abstained. Thus, the said Draft Resolution did not receive the required majority of nine (9) votes in favor for its adoption by UNSC if there is no veto from Permanent Members of UNSC.

IV. ACTIONS TAKEN IN RESPECT OF THE ICC

12. In implementation of the above-mentioned decision, the Chairperson of the Commission through a letter dated 12 October 2013 notified to the President of ICC the outcome of the Extraordinary Summit. In her letter, the Chairperson of the Commission highlighted the following paragraphs of the said Decision:

“ 10.

- x. *Pursuant to this Decision, to request the ICC to postpone the trial of President Uhuru Kenyatta, scheduled for 12 November 2013 and suspend the proceedings against Deputy President William Samoei Ruto until such time as the UN Security Council considers the request by Kenya, supported by the AU, for deferral;*
- xi. *That President Uhuru Kenyatta will not appear before the ICC until such time as the concerns raised by the AU and its Member States have been adequately addressed by the UN Security Council and the ICC”;*

13. In his reply dated 17 October 2013, the President of ICC Judge Song indicated, inter alia, the following:

- (i) That under the Rome Statute, the Presidency has specific responsibilities for certain judicial administrative functions such as the composition of Chambers and the assignment of cases to them. However the Presidency has no role whatsoever in the adjudication of the substance of particular cases - depending on the stage of the proceedings concerned, such matters are entirely the responsibility of the relevant Pre-Trial, Trial or Appeals Chamber;
- (ii) That the matter concerning the scheduling of hearings including possible adjournments of the trial of President Kenyatta and Deputy President Ruto

are the responsibility of Chambers in charge of each case.

V. OUTCOME OF THE 12th ASSEMBLY OF STATES PARTIES (ASP) TO THE ROME STATUTE OF THE ICC

14. The 12th Session of ASP took place in The Hague, Netherlands from 20 to 28 November 2013. The Commission was represented to this session by Representatives of the Bureau of the Chairperson of the Commission and the Office of the Legal Counsel.

15. During the General Debate, a Statement was read, on behalf of the African Union, by the Deputy Attorney General and State Minister of Justice of Uganda.

16. This report will focus on the outcome of the 12th ASP's Special Segment, the Amendments to the Rome Statute and the Rules of Procedure and Evidence.

a) Special segment of ASP

17. In addition, as requested by the Assembly and recommended by the Bureau of ASP, an item was included in the agenda of the 12th session of ASP on “ *Indictment of Sitting Heads of State and Government and its Consequences on Peace and Stability and Reconciliation*”.

18. This item was considered by a Special Segment of ASP conducted in the format of a panel discussion, with subsequent interactive discussion with the participation of representatives of States Parties, Observer States and Non-Governmental Organizations (NGOs). The Acting Legal Counsel of the AU Commission was invited to attend. Also in attendance were the Attorney General of Kenya, Professor Cherif Bassiouni, Professor of International Law and Chairperson of the Drafting Committee of the UN Diplomatic Conference on the Establishment of an International Criminal Court and Mr. Charles Chernor Jalloh, Assistant Professor at the University of Pittsburgh School of Law, Pennsylvania (USA). Prince Zeid Ra'ad Zeid Al-Hussein, Permanent Representative of Jordan to United Nations and first President of the ASP was the moderator of the Segment.

19. In their presentation during the special segment, the Representatives of AU and Kenya reiterated respectively the positions of the AU on the indictment of sitting Head State and Government and its negative impacts on peace and reconciliation in the concerned States. This position was supported by some African States Parties that took the floor during the special segment.

20. Among the views expressed during the debate, it was, *inter alia*, made clear that:

- a) There was strong push against introducing amendment to Article 27 of the Rome Statute relating to the irrelevance of immunities of Heads of State and Government as well as other Senior States Officials;
- b) The Rome Statute and the Rules of Procedure and Evidence offered avenues for more flexibility;
- c) Relevant Rules of Procedure and Evidence may be amended to allow an Accused to be present in the Courtroom through the use of video technology during part or parts of his or her trial;
- d) There was now a positive relationship between peace and justice although tensions between the two remained that needed to be acknowledged and addressed;
- e) There was need to continue dialogue among various Stakeholders.

21. In conclusion, there was broad agreement that ASP should consider looking into practical solutions consistent with the existing legal framework that would address concerns expressed by the African Union. It was also made reference to the delicate balancing act required to achieve the objectives of the fight against impunity on the one hand, and peace and stability on the other and to the challenges posed in the exercise of prosecutorial discretion. Another element generally highlighted was the importance of the principle of complementarity. Finally, there was broad satisfaction that an open process of dialogue had been started in order to address the concerns of African States and it was agreed that this dialogue should continue and develop further.

b) Consideration of the proposed amendments to the Rome Statute and the Rules of Procedure and Evidence

22. A number of proposals to amend the Rome Statute and the Rules of Procedure and Evidence were made by States Parties, Group of States Parties and the Court itself.

i. Proposed amendments to the Rome Statute.

23. In implementation of the Decision of the extraordinary session of the Assembly, the Commission has drafted proposed amendments to the Rome Statute of the ICC in light of the concerns raised by the Assembly with respect to the proceedings initiated by ICC against African sitting Heads of State and Government in violation of principles deriving from national laws and international customary law by which sitting heads of State are granted immunities during their term of office. The main proposal was to amend Article 27 (Irrelevance of Official capacity) of the Rome by insertion of a new paragraph as follows:

“3. Without prejudice to paragraphs 1 and 2 of this Article, no criminal proceedings shall be instituted or continued against a sitting Head of State or Government during his/her term of Office.”

24. This proposal to amend Article 27 of the Rome Statute was submitted to the 12th ASP by South Africa on behalf of African States Parties following the decision by the Extraordinary Session of the Assembly of the African Union held in Addis Ababa, Ethiopia, on 12 October 2013. However, the above-proposed amendment was not considered by the 12th ASP, which decided to forward it to the ASP Working Group on Amendments for consideration.

ii) Proposed amendments to the Rules of Procedure and Evidence (RPE)

25. Proposals for amendments to Rule 68 (*Prior Recorded Testimony*), Rule 74 (*Self-incrimination by a witness*), Rule 76 (*Pre-trial disclosure relating to prosecution witnesses*), Rule 100 (*Place of the Proceedings*) and Rule 134 (*Motions relating to the trial proceedings*) were made by State Party or Group of States Parties.

26. Among the above-proposed amendments to RPE, the ASP Working Group on amendments considered, *inter alia*, the proposals for amendments to Rules 68, 100 and 134.

➤ **Amendment to Rule 68**

27. The purpose of the proposed amendment was to reduce the length of ICC proceedings and streamline evidence presentation. At first stage, the Group of African States Parties were opposed to the adoption of amendment to Rule 68 for the reason that evidence that could be critical and essential in the Chamber's final Ruling would be admitted without the all-important safeguard of cross-examination.

28. At the end of negotiations, a consensual text taking into account the concerns raised by African States Parties emerged. The consensus reached is based that: a) the amendments to the RPE shall not be applied retroactively; b) the Rule as amended is without prejudice to the rights of accused, victims and witnesses as well as their participation in the proceedings.

29. The amendment to Rules 68 was adopted by the 12th ASP as recommended by its Working Group on amendments.

➤ **Amendment to Rule 100**

30. The proposals to amend Rule 100 was intended, *inter alia*, to allow the Court to decide to sit in a State other than the Host State in particular case, where the Court considers that it would in the interests of justice.

31. As recommended by the ASP Working Group on amendments, the proposed amendments to Rule 100 were adopted by the 12th ASP.

➤ **Amendments to Rule 134**

32. The proposals to amend Rule 134 were intended to address the issue of the presence of an Accused subject to a summons to appear through the use of video technology and the Excusal from presence at trial as well as Excusal from presence at trial due to extraordinary public duties. These are new elements to the RPE since the applicable rules do not address the use of video conference technology and the excusal from presence at trial, which were foreseen when the Rome Statute was adopted.

33. Following long and laborious negotiations at the level of the ASP Working Group on amendments, the proposals below to amend Rule 134 were adopted by the 12th ASP as recommended by the said Working Group.

Rule 134bis

“Presence through the use of video technology

1. *An accused subject to a summons to appear may submit a written request to the Trial Chamber to be allowed to be present through the use of video technology during part or parts of his or her trial.*
2. *The Trial Chamber shall rule on the request on a case-by-case basis, with due regard to the subject matter of the specific hearings in question”.*

Rule 134ter

“Excusal from presence at trial

1. *An accused subject to a summons to appear may submit a written request to the Trial Chamber to be excused and to be represented by counsel only during part or parts of his or her trial.*
2. *The Trial Chamber shall only grant the request if it is satisfied that:*
 - a) *exceptional circumstances exist to justify such an absence;*
 - b) *alternative measures, including changes to the trial schedule or a short adjournment of the trial, would be inadequate;*
 - c) *the accused has explicitly waived his or her right to be present at the trial; and*
 - d) *the rights of the accused will be fully ensured in his or her absence.*
3. *The Trial Chamber shall rule on the request on a case-by-case basis, with due regard to the subject matter of the specific hearings in question. Any absence must be limited to what is strictly necessary and must not become the rule”.*

Rule 134quater

“Excusal from presence at trial due to extraordinary public duties

1. *An accused subject to a summons to appear who is mandated to fulfill extraordinary public duties at the highest national level may submit a written request to the Trial Chamber to be excused and to be represented by counsel only; the request must specify that the accused explicitly waives the right to be present at the trial.*
2. *The Trial Chamber shall consider the request expeditiously and, if alternative measures are inadequate, shall grant the request where it determines that it is in the interests of justice and provided that the rights of the accused are fully ensured. The decision shall be taken with due regard to the subject matter of the specific hearings in question and is subject to review at any time”.*

c) Observations

34. It has been observed that contrary to previous sessions of ASP where the positions of the Group of African States Parties to the Rome Statute did not generally comply with the Assembly Decisions on the ICC, the said Group demonstrated during the 12th ASP a strong sense of Unity and presented a formidable front in dealing with the above issues.
35. However, it is recommended to strengthen communication and exchange of information between various stakeholders (the Group of African States Parties in New York, Kenya and the AU Commission) in anticipation of considering by the ASP Working Group on amendments of the proposals to amend Article 27 to the Rome Statute.
36. In the same vein, it is recommended to harmonize the two proposed amendments to Article 27 of the Rome Statute and to submit to the ASP Working Group on amendments one proposal on behalf of African States Parties. This task should be undertaken, as soon as possible, by the Group of African States Parties in New York in collaboration with the AU Commission.
37. The outcome of the 12th ASP may be considered as satisfactory for African States Parties since the amendments to Rule 134 could address some concerns of African Union on the proceedings initiated by ICC against the President and Deputy President of Kenya if the new Rule 134 is applied in flexible manner by the judges of the relevant Trial Chamber who will decide on a case-by-case basis.
38. Meanwhile, African States Parties should continue to push for the amendment of Article 27 of the Rome Statute *“in light of the concerns raised by the Assembly with respect to the proceedings initiated by ICC against African sitting Heads of State and Government in violation of principles deriving from national laws and international customary law by which sitting heads of State are granted immunities during their term of office”.*

VI. RECENT DECISIONS OF THE COURT ON PRESIDENT AND DEPUTY PRESIDENT OF KENYA CASES

39. As requested by the Defense team of President Kenyatta, the trial Chamber v (b) of the ICC decided on 31 October 2013, when the AU Contact Group was visiting New York, to postpone the trial's commencement in the case against President Kenyatta to 5 February 2013.

40. During the reporting period, the Appeals Chamber ruled on the appeal of the Prosecutor against the decision of the trial Chamber v (a) of 18 June 2013, which granted a conditional excusal for William Samoei Ruto from continuous presence at his trial. Holding that the excusal of an accused from physical presence at trial should not become the rule, the Appeals Chamber unanimously reversed the said Decision on 25 October 2013.

41. The Appeals Chamber held that before granting an accused excusal from physical presence at trial, the possibility of alternative measures must be considered, including but not limited to changes to the trial schedule or temporary adjournment. Furthermore, any absence should be considered on a case-by-case basis and be limited to that which is strictly necessary. Finally, the rights of the accused must be fully ensured in his or her absence, in particular through representation by counsel.

42. Following the Decision of the Appeals Chamber, the Trial Chamber V (b) reconsidered its previous decision excusing President Uhuru Muigai Kenyatta from continuous presence at trial, in light of the legal clarifications provided by the Appeals Chamber in its above-mentioned judgment on the matter.

43. Additionally, the Trial Chamber v (a) decided on 22 November 2013 to suspend the trial of Deputy President Ruto till 13 January 2014 due to the absence of the prosecution witnesses.

44. On 19 December 2013, the Prosecutor of ICC filed an application with the Judges requesting an adjournment of the provisional trial date in the case of the *Prosecutor v. Uhuru Muigai Kenyatta*. As indicated in her statement made following the application, this decision was based on the specific facts of this case devoid of extraneous considerations.

45. Indeed, in the last two months, one of the Prosecution key witnesses in the case against President Kenyatta has indicated that he is no longer willing to testify. More recently, on 4 December 2013, a key second witness in the case confessed to giving false evidence regarding a critical event in the Prosecution's case. This witness has now been withdrawn from the Prosecution witness list. Concluding her statement, the ICC Prosecutor stated the following: ***"Having carefully considered my evidence and the impact of the two withdrawals, I have come to the conclusion that currently the case against Mr. Kenyatta does not satisfy the high evidentiary standards***

required at trial. I therefore need time to complete efforts to obtain additional evidence and to consider whether such evidence will enable my Office to fully meet the evidentiary threshold required at trial”.

46. At the time of finalization of the report, the Court has not yet ruled on the request.

VII. OUTCOME OF THE BRAINSTORMING SESSION ON THE BROAD AREAS OF INTERNATIONAL CRIMINAL JUSTICE SYSTEM, PEACE, JUSTICE AND RECONCILIATION AS WELL AS THE IMPACT/ACTIONS OF THE ICC IN AFRICA AND THE WAYS OF STRENGTHENING AFRICAN MECHANISMS TO DEAL WITH AFRICAN CHALLENGES AND PROBLEMS

47. Pursuant to Decision Assembly/AU/Dec.482 (XXI) on International jurisdiction, Justice and the International Criminal Court adopted by the Assembly of the African Union in May 2013, a Brainstorming Session on the broad areas of International Criminal Justice System, Peace, Justice and Reconciliation as well as the impact/actions of the ICC in Africa and the ways of strengthening African mechanisms to deal with African challenges and problems was held in Addis Ababa, Ethiopia on 16 and 17 December 2013.

48. The following were in attendance:

Member States: Algeria, Angola, Botswana, Burkina Faso, Burundi, Comoros, Congo, Equatorial Guinea, Eritrea, Ethiopia, The Gambia, Gabon, Ghana, Guinea, Kenya, Lesotho, Liberia, Libya, Mali, Mauritius, Namibia, Niger, Nigeria, Rwanda, Sahrawi Arab Democratic Republic, Senegal, Seychelles, Sierra Leone, South Africa, South Sudan, Tunisia, The Sudan, Togo, Uganda and Zambia.

AU Organs and RECs: The African Court on Human and Peoples’ Rights, the African Union Commission on the International Law, the Pan African Parliament, the AU Commission and COMESA. The meeting was also attended by two (2) independent Experts.

49. The attached recommendations in annex were adopted and recommended by the Brainstorming session for consideration by the AU Policy Organs.

VIII. RECOMMANDATIONS

50. The Commission would like to propose for consideration by the Assembly through the Executive Council the following recommendations:

- i. *The Assembly should reiterate the commitment of the African Union and its Member States to fight against impunity in accordance with the Constitutive Act;*

- ii. *The Assembly should reiterate its previous Decisions adopted on ICC;*
- iii. *The Assembly should express its deep disappointment that the request by Kenya with the support of the African Union, to the UN Security Council to defer the proceedings initiated against the President and Deputy President of the Republic of Kenya in accordance with Article 16 of the Rome Statute of ICC on deferral of cases by the UN Security Council, has been rejected;*
- iv. *The Assembly should express its deep disappointment that the request by the African Union to the UN Security Council to defer the proceedings initiated against the President of the Republic of Sudan in accordance with Article 16 of the Rome Statute of ICC on deferral of cases by the UN Security Council, has not been acted upon to date;*
- v. *The Assembly should stress on the need for the UN Security Council to reserve an adequate response to requests made by the AU on deferral in accordance with Article 16 of the Rome Statute under Chapter VII of the UN Charter so as to avoid the sense of lack of consideration of a whole continent;*
- vi. *The Assembly should decide that the African Union and its Member States, in particular the African States Parties to the Rome Statute, reserve the right to take any further decisions or measures that may be necessary in order to preserve and safeguard peace, security and stability, as well as the dignity, sovereignty and integrity of the continent;*
- vii. *The Assembly should take note of the outcome of 12th Session of ASP regarding the Special Segment and the amendments to Rule 134 of the Rules of Procedure and Evidence of the ICC;*
- viii. *The Assembly should also take note of the Decision of the 12th ASP inviting its Working Group on amendments to continue its consideration of amendments to the Rome Statute submitted prior to the Review Conference and those submitted following the decision by the Extraordinary Summit of the African Union held on 12 October 2013 and call upon all African States Parties to support proposed amendment to Articles 16 and 27 of the Rome Statute ;*
- ix. *African States Parties should comply with African Union Decisions on ICC and continue to speak with one voice to ensure that the African proposal for amendments to Articles 16 and 27 of the Rome Statute of the ICC are considered by the ASP working Group on amendments as well as by the forthcoming sessions of the Assembly of States Parties (ASP) to the Rome Statute;*

- x. *There is an imperative need for all African States Parties to ensure that they adhere and articulate commonly agreed positions in line with their obligations under the constitutive Act of the African Union;*
- xi. *The Group of African States Parties in New York and the African Members of the Bureau of ASP should follow-up on the implementation of various Decisions of the Assembly on ICC, in collaboration with the Commission and ensure that the African proposals and concerns are properly considered/addressed by the ASP and report to the Assembly through the Commission on actions taken;*
- xii. *The Assembly should take note and endorsed the recommendations of the Brainstorming Session on the broad areas of International Criminal Justice System, Peace, Justice and Reconciliation as well as the impact/actions of the ICC in Africa and the ways of strengthening African mechanisms to deal with African challenges and problems held on 16 and 17 December 2013;*
- xiii. *The Commission in collaboration with all stakeholders should follow-up on this matter with a view to ensuring that the African proposals/concerns are considered/addressed by the forthcoming ASPs and to report regularly to the Assembly through the Executive Council.*

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BRAINSTORMING ON THE BROAD AREAS OF INTERNATIONAL CRIMINAL JUSTICE SYSTEM, PEACE, JUSTICE AND RECONCILIATION AS WELL AS THE IMPACT/ACTIONS OF THE ICC IN AFRICA AND THE WAYS OF STRENGTHENING AFRICAN MECHANISMS TO DEAL WITH AFRICAN CHALLENGES AND PROBLEMS

**16 and 17 December 2013
Addis Ababa, Ethiopia**

Original: English

ANNEX

RECOMMENDATIONS

**RECOMMENDATIONS BRAINSTORMING ON THE BROAD AREAS OF
INTERNATIONAL CRIMINAL JUSTICE SYSTEM, PEACE, JUSTICE
AND RECONCILIATION AS WELL AS THE IMPACT/ACTIONS OF
THE ICC IN AFRICA AND THE WAYS OF STRENGTHENING
AFRICAN MECHANISMS TO DEAL WITH AFRICAN
CHALLENGES AND PROBLEMS**

After consideration of the Concept Note developed by the Workshop held in Arusha, Tanzania, on 7 and 8 December 2013, and the recommendations contained therein, the Brainstorming Session adopted the following recommendations:

- R1.** *The Assembly should reiterate the unflinching commitment of the African Union and its Member States to combatting impunity, promoting human rights, democracy, the rule of law and good governance in the continent;*
- R2.** *The Assembly should express its deep disappointment that the request by Kenya with the support of the African Union, to the UN Security Council to defer the proceedings initiated against the President and Deputy President of the Republic of Kenya in accordance with Article 16 of the Rome Statute of ICC on deferral of cases by the UN Security Council, has been rejected;*
- R3.** *The Assembly should also express its deep disappointment that the request by the African Union to the UN Security Council to defer the proceedings initiated against the President of the Republic of The Sudan in accordance with Article 16 of the Rome Statute of ICC on deferral of cases by the UN Security Council, has not been acted upon to date;*
- R4.** *The Assembly should strongly stress on the need for the UN Security Council to reserve an adequate response to requests made by the AU on deferral in accordance with Article 16 of the Rome Statute under Chapter VII of the UN Charter so as to avoid the sense of lack of consideration of a whole continent;*
- R5.** *The Assembly should decide that the African Union and its Member States, in particular the African States Parties to the Rome Statute, reserve the right to take any further decisions or measures that may be necessary in order to preserve and safeguard peace, security and stability, as well as the dignity, sovereignty and integrity of the continent;*
- R6.** *The Assembly should decide to continue to pursue the legal, political and strategic approach in addressing AU's concerns on the proceedings initiated by ICC against African Sitting Heads of State and Government and the threat that it may pose to the on-going efforts in the promotion of peace, national healing*

and reconciliation, as well as the rule of law and stability, not only in the concerned AU Member States, but also in the continent;

- R7.** *The Assembly should request that an African Union Agenda on the fight against impunity be developed by the AU Commission in collaboration with the African Court on Human and Peoples' Rights and with the participation of other relevant Organs of the Union, the Member States and other relevant stakeholders;*

- R8.** *Given the grave nature of serious crimes of international concern such as genocide, crimes against humanity, war crimes, torture, Crime of aggression and terrorism, a programme for strengthening the capacity of national judiciaries to prosecute such international crimes should be developed by the AU Commission in collaboration with the African Court on Human and Peoples' Rights and with the participation of other relevant Organs of the Union and the Member States. With a view to exploring and strengthening co-operation in matters of criminal justice between AU Member States, the AU Commission should, in collaboration with relevant stakeholders, establish a Network of Prosecutors from AU Member States in charge of prosecution of genocide, crimes against humanity, war crimes, torture, crime of aggression and terrorism;*

- R9.** *The process of finalization and adoption of the African Union Policy Framework on Peace, Justice, and Reconciliation including the AU Draft Transitional Justice Policy Framework should be expedited in accordance with the relevant decision of the AU Peace and Security Council;*

- R10.** *The AU Commission and the African Union Commission on International Law (AUCIL) should expedite finalisation of the study on the immunities of Sitting Heads of State and Government as well as other Senior State Officials from States which are not Parties to the Rome Statute in accordance with Decision Assembly/AU/Dec.397 (XVIII) adopted in July 2012;*

- R11.** *The full operationalization of the African Peace and Security Architecture (APSA) including the strengthening of the Early Warning System should be expedited in order to prevent conflicts and the commission of international crimes in Africa;*

- R12.** *The Draft Protocol granting criminal jurisdiction to the African Court of Justice and Human Rights should be adopted after reconsideration of and amendments to its draft Articles on the immunities of Sitting Heads of State and Government as well as other Senior State Officials and Member States should be encouraged to sign, ratify and/or accede to it upon its adoption;*

- R13.** *AU Member States should be encouraged to adopt national legislative and other measures aimed at preventing, prosecuting and punishing war crimes, genocide and crimes against humanity. To this end, the AU Commission should develop a Model Law on Mutual Legal Assistance and Extradition. In this regard, AU Member States should also be encouraged to fully take advantage of the existing African Union model national law on universal jurisdiction over international crimes in accordance with Decision EX.CL/Dec.708 (XXI) adopted in July 2012 as well as the said model law to be developed;*
- R14.** *AU Members States should be encouraged to sign, ratify/accede and domesticate regional, continental and international instruments of human rights in particular the Protocol establishing the African Court on Human and Peoples' Rights;*
- R15.** *AU Member States should be encouraged to adopt bilateral Mutual Legal Assistance and Extradition Agreements and should also consider adopting a Treaty on mutual legal assistance and extradition at the AU Level for the prosecution of war crimes, genocide, crimes against humanity, crime of aggression and terrorism by national Courts. In this regard, the AU Commission in collaboration with the AU Commission on the International Law (AUCIL) should conduct a Comprehensive Study on the feasibility and legal implications of adopting an AU Mutual Legal Assistance and Extradition Treaty;*
- R16.** *The brainstorming process involving more studies and discussions should be carried out and continued at an in depth level for each of the main issues that are emanating from the AU concerns on the abusive application of the principle of Universal Jurisdiction by National Courts of Non-African States and the International Criminal Justice System namely: immunities of Sitting Heads of State and Government, principle of complementarity, issue of combining/sequencing peace, justice and reconciliation as well as the role of the UN Security Council in the work of ICC.*

2014-01-30

Progress report of the commission on the implementation of the decisions of the assembly of the African union on the international criminal court

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